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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-677

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR T. VANDERBILT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI.

May it please the Court:

The petition of William C. Krueger, Hugh C. Barrett and Inglis M. Uppercu, as Surviving Trustees in Liquidation of United States Brewing Company, respectfully shows to this Honorable Court:

A.

Summary and Short Statement of the Matter Involved.

Two principal questions are involved in the present case: (1) the right of the petitioners to recover certain income and profits taxes on the ground that the assessment of such taxes was barred by lapse of time, where certain Waivers

or Consents, purporting to extend the time for assessment, were signed by only one of the three surviving trustees in liquidation of the taxpayer-company without authority from his co-trustees and where the applicable law of New Jersey requires that trustees in liquidation of a dissolved company act by a majority; and (2) whether an amendment to a claim for refund, which amendment was based on the Government's failure to allow proper losses caused by the enactment of prohibition legislation, was timely filed though filed after the period for filing claims since it was related to a prior timely claim the consideration of which led the Government into the field covered by the amendment. Since the refund claimed in the second question involves a portion of the same taxes claimed under the first question, a decision in favor of the petitioners on the first issue would eliminate the necessity of deciding the second question. These questions are raised by Counts 1 and 2, respectively, of petitioners' complaint below, and respondent's amended answer thereto (R. 3-20).

The United States Brewing Company was incorporated under the laws of New Jersey (R. 21). On July 10, 1922, the corporation was voluntarily dissolved pursuant to Section 31 of the Corporation Act of the State of New Jersey (P. L. 1896, Ch. 185, p. 287, sec. 31, now R. S. 14·13-1) (R. 22). (The text of R. S. 14:13-1 is annexed to the brief accompanying this petition and is printed as Appendix A thereto.)

At the time of dissolution the directors of the corporation were Gottfried Krueger, William C. Krueger, Peter Hauck, Jr., Hugh C. Barrett, and Inglis M. Uppercu (R. 22). By virtue of the Corporation Act of New Jersey, R. S. 14:13-5, R. S. 14:14-8, these directors became the statutory liquidating trustees with sole power to wind up the corporate affairs, and in whom title to the corporate property vested. (The text of R. S. 14:13-5 and R. S. 14:14-8 is annexed to

the brief accompanying this petition and is printed as Appendix B and C, respectively, thereto.) Peter Hauck, Jr. died on September 8, 1922, and Gottfried Krueger died on November 6, 1926, leaving the present petitioners as the surviving liquidating trustees (R. 23).

On December 12, 1923, Hugo Boepple, Jr., who had been Assistant Secretary of the corporation, informed the Commissioner of Internal Revenue of the dissolution, and requested that an examination of the corporation's books for the years 1918 and 1919, in which the Commissioner was then engaged, be extended to include the following years (R. 24, 149).

After examination, the commissioner notified the corporation of a proposed jeopardy assessment for the calendar year 1918 in the amount of $426,209.28, and a tax deficiency in that amount was assessed on the March 1924 list of assessments for 1918 (R. 24-26).

On April 7, 1924, a claim for abatement was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, and conferences were arranged (R. 26, 166).

The liquidating trustees, by a resolution of November 7, 1924 authorized one William F. Hoffmann to act for them as attorney in fact, and to settle the tax claims. A copy of this resolution was filed with the government on the same date (R. 389-390, 405, 410, 445, 172-173, 26).

After the first conference in Washington on November 10, 1924, Mr. Hoffmann attended from twenty-five to thirty conferences with government officials in order to dispose of the tax claims as quickly as possibl (R. 390-391).

At the first conference, Mr. Hoffmann was accompanied by William C. Krueger, and Mr. Snelham, an accountant. This was the only conference with government representatives that William C. Krueger ever attended (R. 444-445). Following the first conference, the taxpayer was allowed additional time within which to submit data supporting its

claim conditional upon the furnishing of waivers of the statutory periods of limitation for assessment of any deficiencies ultimately determined to be due (R. 175).

On November 11, 1924, Mr. Snelham prepared a form of Waiver, and a form of Power of Attorney appointing his associate, Edward M. Treanor, attorney in fact to act for the Trustees and mailed the forms to William C. Krueger (R. 184, 185).

On November 12, 1924 Hugo Boepple, Jr., who was not a Trustee in liquidation, but who, as was previously stated, was assistant secretary of the company before dissolution, received these documents, took them to William C. Krueger, had him sign them, attested his signature, attached the seal, and mailed them to the Government the same day (R. 424-425).

The other Trustees had no knowledge of these documents, and never authorized William C. Krueger to sign a waiver, nor did they authorize Mr. Krueger or any person other than Mr. Hoffmann to act for them (R. 405, 410-411, 428-430). Mr. Hoffman, moreover, the authorized representative of the trustees, had no knowledge of the documents and did not authorize Mr. Krueger to execute them (R. 391-392, 424-426).

Although the Waiver and the Power of Attorney were signed by William C. Krueger at the same time, the Government, after receipt of the documents and after inquiring into Krueger's authority to act for the Trustees, kept the Waiver but returned the Power of Attorney on December 19, 1924 together with a letter in which the Government stated:

> "You are requested to have the power of attorney executed by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200-201).

The Government, at the date of the above letter, necessarily had notice that a single liquidating trustee had no authority under the laws of New Jersey to act for the board of trustees of a dissolved corporation. On that date, five months remained for the fiscal year 1919 and eighteen months for the fiscal years 1920 and 1921 within which to assess any tax claimed due for those years. Nevertheless, the Government permitted the limitation of Section 277 (a) (2) and (a) (3) of the Revenue Act of 1926, 44 Stat. 58, to run without making a timely assessment. (The text of Section 277 (a) (2) and (a) (3) of the Revenue Act of 1926 is annexed to the brief accompanying this petition and is printed as Appendix D thereto.)

During the year 1925, data on obsolescence of the corporation's plant was submitted and considered. The problems were still under consideration in December, 1925, when it became necessary for the Government to secure further waivers (R. 28-29, 224).

Accordingly, on December 14, 1925, William C. Krueger signed four Waivers for the years 1918, 1919, 1920 and 1921 respectively (R. 29, 227-234). These waivers were signed by Mr. Krueger in the same manner and under the same circumstances as the first waiver: *i. e.*, Mr. Boepple received the documents in the mail, took them to Mr. Krueger, had him sign them, attested the signature, made an impression of the seal thereon, and mailed them to Washington the same day (R. 424-425).

Mr. Barrett and Mr. Uppercu, the other Trustees, had no knowledge of these Waivers, and never authorized William C. Krueger to sign them. Nor did they authorize Mr. Krueger or any person other than William F. Hoffmann to act for them. Mr. Hoffmann, moreover, had no knowledge of the Waivers and did not authorize Mr. Krueger to act. The receipt, execution and filing of these Waivers was at no time called to the attention of, or discussed

with, Mr. Hoffmann or the Trustees (R. 391-392, 405, 410-411, 424-426, 428-430, 445-446).

Following the aforementioned conferences, Mr. Hoffmann accepted a Government figure of approximately $129,000, though he had no information as to its accuracy (R. 391).

The company's payment of these income taxes on December 15, 1926 was in the sum of $136,366.55, covering the following (R. 30-31, 290):

Assessment for period Jan. 1, 1918 to March 31, 1918	$4,885.19
Deficiency fiscal year ended March 31, 1919	38,206.46
Deficiency fiscal year ended March 31, 1920	87,241.61
Deficiency fiscal year ended March 31, 1921	1,086.83
Interest	4,947.46
	$136,366.55

The first count of petitioners' complaint sought the recovery of the entire sum paid. On the oral argument, however, the petitioners withdrew their claim for $4,885.19, the amount paid under the assessment for the period January 1, 1918 to March 31, 1918 (R. 477).

The respondent, by its amended answer, has admitted that unless it can establish either the validity of the Waiver or sufficient facts to create an estoppel, the balance of taxes paid is fully recoverable under the First Count of petitioners' complaint (R. 13-15, 16-18).

The petitioners' claim under the Second Count of their complaint seeks the recovery of a portion of the same tax the recovery of which is sought under the First Count. Hence a judgment in favor of petitioners on the First Count would eliminate the necessity for a consideration of the Second Count.

In the Second Count, the petitioners alleged that the United States Brewing Company, prior to the effective date

of prohibition, was engaged in the manufacture of beers, ales, and porter, operating three plants known as the Krueger Brewery, the Trefz Brewery, and the Hauck Brewery; that prohibition destroyed its business, and forced the closing of its breweries early in 1920 and their sale subsequent thereto at a loss of $932,646.82. It was then alleged that the breweries were not thereafter opened or used by the company in any manner except that the Krueger and Hauck breweries were, prior to their sale, operated intermittently for a period of about two years in experimenting with the manufacture of near beer, and that the Government determined that the sole cause of the loss was due to prohibition legislation, but notwithstanding this determination, allowed but $533,442.49 of the loss and disallowed the remaining $399,204.33 because of the experiments with near beer (R. 8-13). In its amended answer the Government denied the petitioners' allegations and, in addition, as a separate defense, pleaded the statute of limitations (R. 15-16, 18-20).

The facts established at trial bearing on the Second Count were these:

The United States Brewing Company, prior to January 16, 1920, had built up a substantial and lucrative business in the manufacture and sale of beers, ales, and porter, and had invested large sums in plants and equipment for that purpose (R. 21).

In its tax returns for the fiscal years ended March 31, 1919, 1920 and 1921 the company claimed a loss for obsolesence of its properties caused by the enactment of prohibition legislation (R. 78-125).

On June 22, 1925, Herbert J. Ord, a government engineer, after examination of the United States Brewing Company properties, submitted a report to his superiors entitled "Report on Obsolescence" (R. 205). This report was accepted, approved, and acted upon by the Government in the

assessment letter of June 3, 1926, which formed the basis of the computation and determination of the tax assessed against the company in October, 1926 (R. 28, 237). In this report Mr. Ord found, and by its acceptance of the report, the Government determined, that on January 31, 1918, the net depreciated cost of the properties used by the United States Brewing Company in the manufacture of beer was $1,667,646.82 (R. 207). These properties were sold for cash for the sum of $735,000, resulting in a loss of $932,646.82 (R. 15, 24).

Mr. Ord in his Report found, and by its acceptance of that report the Government determined, that prohibition legislation was the sole cause of this loss (R. 217).

Despite this determination, the Government allowed but $533,442.49 of the $932,646.82 loss and disallowed the remainder of $399,204.33 (R. 29). The reason for the disallowance was the intermittent operation of the Krueger and Hauck Breweries in experimenting with near beer. As Mr. Ord stated:

> "The Krueger and Hauck Breweries were shut down for a time in 1920. They were then operated intermittently until April, 1922, in experimenting with the manufacture of 'near beer' or so called 'cereal beverages' " (R. 206).

On February 6, 1930, the Company made its claims for refund in the amounts of $38,206.46, $87,241.61 and $1,085.83 for the fiscal years March 31, 1919, 1920 and 1921 respectively, on the ground that the assessment and collection of the taxes paid were made beyond the statutory period of limitation (R. 31-32).

The consideration of these claims for refund by the Government, and the discussions had concerning its defenses thereto, including a defense that the petitioners were estopped to deny the validity of the Waivers, led to the filing by the petitioners of a Brief, dated August 25, 1931, with the

Commissioner of Internal Revenue. In this Brief the petitioners, in seeking to rebut the defense of estoppel, stated:

> "It is to be noted that in this case no such defense can exist, in that the Commissioner of Internal Revenue knew at the time and before the time these documents were requested that the individual liquidating trustee, William C. Kruger, had no authority to bind the Corporation. The failure of the taxpayer to procure representation of Tax Counsel was a serious detriment to the proper disposition of its case. This is readily evident, if one were to consider the merits of the case itself, which are as follows:
>
> "The taxpayer filed a claim for Obsolescence predicated upon the National Prohibition Act. In an Obsolescence report prepared by one, Herbert J. Ord, an Engineer employed by the Bureau of Internal Revenue, it was found that the undepreciated costs of the taxpayer's property, upon which obsolescence was properly allowable aggregated $2,440,136.11. The depreciated costs thereof to January 31, 1918 were $1,667,646.82. The total obsolescence allowed therefor was $533,442.49, notwithstanding the fact that the Taxpayer actually sold to wholly disinterested parties the entire plant and property for a total consideration of $735,000.00, which deducted from the depreciated cost of $1,667,646.82 resulted in a loss to the Taxpayer of $932,646.82, that was directly attributable to the passage of the National Prohibition Act. It is further to be noted that the aforesaid plant and property was sold in 1922 and that during the interim from 1919 to 1922 a small portion of the plant was devoted to an attempt to manufacture a small quantity of near beer, so as to maintain such revenue as could possibly be derived for the purpose of paying local and state taxes. It must be conceded that if the Taxpayer had the benefit of the experience and knowledge of any competent Tax Counsel or Auditor, that the aforesaid facts could have been properly presented to the Bureau of Internal Revenue and a loss allowed in full rather than only in

part, to the extent of approximately one half of the actual amount. It is further to be noted that the report of Herbert J. Ord, the Engineer states that he found as a fact that the Corporation did not institute the manufacture of near beer, but instead took definite steps in 1920 to go out of business and further, said Engineer's report specifically states as his final conclusion to said report that he is fully satisfied that National Prohibition was and is the sole cause of the losses to the Taxpayer Corporation" (R. 340-341).

On August 11, 1932, the petitioners filed formal amendments to their claims for refund for the fiscal years ended March 31, 1919, 1920 and 1921 in the respective amounts of $38,206.48, $100,000, and $1,085.83 in which they claimed they were entitled to deduct the entire loss caused by the enactment of prohibition legislation without regard to the experiments with near beer (R. 32, 350-355).

The principal defense of the respondent to the Second Count of the complaint was that the amended claims for refund were barred by the statute of limitations, Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, in that they were not sufficiently related to the grounds presented in the prior timely claims. (The text of Section 284 of the Revenue Act of 1926 is annexed to the brief accompanying this petition and is printed as Appendix E thereto.)

The District Court found for the petitioners, plaintiffs below, on the First Count and ordered the entry of judgment in the amount of $126,533.90 with interest (R. 500-502). No judgment was rendered on the Second Count. The court's findings of fact were substantially to the same effect as the facts herein outlined (R. 482-494). In particular, the court found that the liquidating trustees authorized William F. Hoffmann to act for them as attorney in fact in attending conferences relating to the tax matters; that Mr. Hoffmann attended at least twenty-five or thirty conferences with Government officials, only one of which, the first conference, was

attended by William C. Krueger; that the liquidating trustees other than William C. Krueger never authorized the latter to sign the waivers, never authorized anyone other than Mr. Hoffmann to act for them, and that Mr. Hoffmann and the trustees had no knowledge whatsoever of the waivers or the power of attorney appointing Mr. Treanor; that although the first waiver and the power of attorney were both signed by William C. Krueger at the same time, the Government, after inquiring into Mr. Krueger's authority to act, kept the waiver and returned the power of attorney with an accompanying letter in which the Government concluded that Mr. Krueger had no authority, under New Jersey law, to act with reference to the power of attorney; and, that the Government, after it had knowledge of the limitations on Mr. Krueger's powers, still had five months for the fiscal year 1919, and eighteen months for the fiscal years 1920 and 1921 within which to assess any tax it claimed to be due, and despite that knowledge, permitted the statute of limitations to run without making a timely assessment. The court therefore found, in its Conclusions of Law, that under the Corporation Act of New Jersey, the liquidating trustees must act by at least a majority, and a single trustee cannot, by his individual act, bind the trustees or the property of the dissolved corporation; that the laws of New Jersey control the question as to who is empowered to act for a New Jersey corporation in dissolution; that the assessments for 1919, 1920 and 1921, having been made after the bar of the statute of limitations had fallen, were unlawful and illegal; and that the petitioners were not estopped from claiming a refund of the tax (R. 495).

The opinion of the District Court is reported in *Krueger* v. *United States*, 33 F. Supp. 102, and in the Record at page 496.

The Circuit Court of Appeals for the Third Circuit rendered judgment of reversal on June 30, 1941, appar-

ently on the ground that one liquidating trustee had power to waive the statute of limitations, but that, in any event, Mr. Krueger possessed at least implied authority from his co-trustees to waive the limitation on assessments (R. 521).

The Circuit Court of Appeals felt that the Second Count was "not pressed with any great zeal" and disposed of that Count by finding that there was no relation between the amendment and the original claim for refund. The opinion of the Circuit Court of Appeals was unreported officially at the time of the filing of this petition. It will be found in the Record at page 514.

B.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Third Circuit in holding that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which federal income and profits taxes may be assessed, has decided an important question of local law in a way which conflicts with the applicable statutes and decisions of New Jersey. The matter is of importance aside from the large sums of money involved. In failing to follow the State law, the Circuit Court of Appeals has, in effect, refused to follow the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, where it was held that neither Congress nor the Federal Courts can constitutionally declare the substantive rules of law applicable in a state. More specifically, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257 and *Glenn* v. *Liggett,* 135 U. S. 533 where it was held that the powers of a corporation in dissolution and the rights of the parties in a suit by a dis-

solved corporation to enforce unpaid subscriptions to stock are governed by the law of the state of incorporation.

2. The Circuit Court of Appeals for the Third Circuit, in holding that William J. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the federal income and profits tax, nullified the findings of fact of the District Court for the District of New Jersey, thereby ignoring or misconstruing Section 52 (a) of the Rules of Civil Procedure, and in effect deciding a question of law in conflict with the decisions of the Circuit Courts of Appeals for the Seventh, Ninth and Tenth Circuits. *Santa Cruz Oil Corp.* v. *Allbright-Nell Co.*, 115 F. (2d) 604 (C. C. A. 7th); *Webb* v. *Frisch*, 111 F. (2d) 887 (C. C. A. 7th); *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557 (C. C. A. 10th); *Kelly* v. *Aderhold*, 112 F. (2d) 118 (C. C. A. 10th); *Wittmayer* v. *United States*, 118 F. (2d) 808 (C. C. A. 9th). (The text of Section 52 (a) of the Rules of Civil Procedure is annexed to the brief accompanying this petition and is printed as Appendix F thereto.)

3. The Circuit Court of Appeals for the Third Circuit, in denying, on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a federal question in a way probably in conflict with the decisions of this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28.

4. The Circuit Court of Appeals for the Third Circuit, in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Pink* v. *United States,* 105 F. (2d) 183, and in conflict with the decisions of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290, *cert. den.* 293 U. S. 599 and in *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153, *cert. den.* 301 U. S. 686, on the same matter.

5. The Circuit Court of Appeals for the Third Circuit, in denying, on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court. See *United States* v. *Andrews,* 302 U. S. 517, 527.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 7508, *United States*

of America, Appellant, v. *William C. Krueger, Hugh C. Barrett and Inglis M. Uppercu, as surviving trustees in liquidation of United States Brewing Company, Appellees,* and that the said judgment of the Circuit Court of Appeals of the Third Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

ARTHUR T. VANDERBILT,
Counsel for Petitioners.